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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-574

GIBSON DISTRIBUTING COMPANY, INC., ET AL.,
Appellant,

vs.

DOWNTOWN DEVELOPMENT ASSOCIATION
OF EL PASO, INC.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION OF APPELLEE TO DISMISS APPEAL

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Appellee moves that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial Federal question; the Federal question sought to be reviewed has been expressly passed on; and the judgment of the Supreme Court of Texas rests on an adequate non-Federal basis

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

Appellant seeks to have the Texas Blue Law declared unconstitutional, despite numerous decisions by the Supreme Court of Texas upholding its constitutionality, and numerous decisions by this Court upholding the constitu-

tionality of similar Saturday-Sunday Closing Laws in other States. In Appellant's *Jurisdictional Statement*, it has presented two questions for review by this Court, to wit:

(1) When Section 4 of Article 9001 allows private parties to join in concert to prohibit their competitors from selling certain items one day a week, normally Sunday, and thus allows the private parties to protect their competitive share of the market without opening on that one day, is the section preempted by Section 1 of the Sherman Act, which encourages competition, as an unnecessary burden on the regulation of interstate commerce by the U. S. Congress?

(2) When the legislative history of Article 9001 and the extensive record in the trial court show conclusively that the article clearly fails to accomplish its stated purposes of promoting the health, recreation and welfare of the people of Texas and its interpreted purpose of granting a common day of rest to the people of Texas, does the article violate the due process clause of the United States Constitution?

Neither of the questions presented by Appellant are "substantial" and do not merit further consideration or review by this Court. On at least two previous occasions involving this precise Texas Statute, this Court has dismissed the appeal for want of a substantial Federal question, *Spartan's Industries, Inc.* v. *Texas*, 397 U.S. 590, 25 L.Ed.2d 596, 90 Sup.Ct. 1359 (1970); *Sundaco, Inc.* v. *Texas*, 397 U.S. 591, 25 L.Ed.2d 597, 90 Sup.Ct. 1362 (1970). In *Arlan's Department Store of Louisville, Inc.* v. *Kentucky*, 371 U.S. 218, 9 L.Ed.2d 264, 83 Sup.Ct. 277 (1962), this Court also dismissed an appeal challenging the constitutionality of the Kentucky Sunday Closing Law for want of a substantial Federal question.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED HAS BEEN EXPRESSLY PASSED ON.

Appellant contends that the enforcement of the Texas Blue Law, by Appellant's competitors, is violative of Section 1 of the Sherman Act. In *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L.Ed.2d 464, 81 Sup.Ct. 523, rehearing denied, 365 U.S. 875, 5 L.Ed.2d 864, 81 Sup.Ct. 899 (1961), this Court held that no violation of the Sherman Act could be predicated on the attempt by private persons to influence the passage or enforcement of State laws regulating competition in the trucking industry.

The precise question raised by Appellant has been considered and rejected in the recent case of *Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.*, 560 F.2d 211 (6th Cir., 1977). In that particular action, a drug store company brought an antitrust suit against its competitors claiming damages represented by loss of profits when its business was allegedly diminished for three years, while it was enjoined from Sunday operations, as the result of a lawsuit filed by its competitors. The Court held that the competitors of the drug store company had a constitutional right of access to the State Courts to enforce the State Sunday Closing Law against the drug company under the First Amendment to the Constitution of the United States.

The Supreme Court of Texas, in its Opinion delivered on July 12, 1978, set forth in full in Appendix A and reported in 21 Tex.Sup.Ct.Jur. 493, felt that *Parker* v. *Brown*, 317 U.S. 341, 8 L.Ed. 315, 63 Sup.Ct. 307 (1943) was dispositive. It was the unanimous decision of the Supreme Court of Texas, as announced by Chief Justice Joe R. Greenhill, at page 494 of the Opinion that:

"As we read *Parker* v. *Brown*, 317 U.S. 341 (1943), and other opinions of the Supreme Court, State action affecting commerce is generally considered to be 'exempted' from the Sherman Act. Perhaps it is more accurate to say that the rule of pre-emption is simply not applicable to such State action."

Appellant seizes upon language in the case of *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 49 L.Ed.2d 1141, 96 Sup.Ct. 3110 (1976) to establish a semantical distinction between the concepts of pre-emption and exemption. The basic holding of *Cantor* is merely that unlawful private conduct is not exempt from the antitrust laws because it is permitted or required by State law. The facts in that case are clearly distinguishable from the facts presently before this Court. In *Cantor*, the utility provided free light bulbs to its customers. The Appellant alleged that the "tie" of light bulb sales to the provision of electric service violated the antitrust laws, and the fact that the arrangement had the imprimatur of the State of Michigan by virtue of their approval of the utility's tariff, should not exempt the utility from antitrust liability.

The facts before this Court do not involve a private party's efforts to wrap its self-protective business practices in the State's cloak of exemption. On the contrary, this case involves the enforcement of a State enacted (versus State approved) statute promoting the health, recreation and welfare of the people within that State. Article 9001 of the Texas Revised Civil Statutes is set forth in full in Appendix B. Section 4 of that Statute provides:

"The purpose of this Act being to promote the health, recreation and welfare of the people of this State, the operation of any business whether by any individual partnership or corporation contrary to the provi-

sions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceeding shall be guided by the rules of other injunction proceedings."

While placing great reliance upon the *Cantor* case, Appellant ignores Mr. Justice Blackmun's observation in his concurring Opinion at page 611:

"If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a State enactment. I would assess the justifications of such enactments in the same way as is done in equal protection review, and where such justifications are at all substantial. . . I would be reluctant to find the restraint unreasonable."

Not only are the justifications for the Statute substantial, but the overwhelming evidence in the record demonstrates that Appellee has enforced the Statute in a fair and non-discriminatory manner: Downtown Development Association of El Paso, Inc. is composed of both large and small merchants, located throughout the City of El Paso, Texas (S.F. 173, 195); Appellee utilizes the funds of both members and non-members (S.F. 183) to shop merchants throughout the City (S.F. 42-43), both member and non-member, in a random manner (S.F. 178, 196); very few of the 24 lawsuits instituted by Appellee have been against suburban discount stores (S.F. 181-182) and injunctions, either temporary or permanent, have been obtained in each and every instance (S.F. 182, 198).

In *Oyler* v. *Boles*, 368 U.S. 448, 82 Sup.Ct. 501, 7 L.Ed.2d 446 (1962), this Court rejected a contention that selective enforcement of a penal statute against certain

habitual offenders was a denial of the equal protection guarantee under the Constitution and held that the conscious exercise of some selectivity in enforcement is not in itself a Federal constitutional violation.

In its second question, Appellant contends that the Texas Blue Law violates the Due Process Clause of the United States Constitution. Appellant places great reliance upon, and devotes a considerable portion of its *Jurisdictional Statement* to the alleged legislative history of Article 9001, as recounted in a book entitled *The Texas Blue Laws* by William Harper, published in 1974. As noted by the Texas Retailers' Association in its Amicus Curiae Brief to the Supreme Court of Texas, at page 3:

> "Appellant in his case relies heavily upon Harper's book, *The Texas Blue Laws*. We would show the Court that such book is not a competent authority on the legislative history of Article 9001. The Texas Legislature, at the time of the enactment of such Article, made no transcripts or recordings of any nature of House or Senate proceedings. This includes both testimony and discussions at Committee hearings and also floor debate and consideration. Such recordings and transcripts have only been made during the last few years. It is evident from such book that the alleged facts were obtained from *some* newspaper articles written at that time."

The question of whether similar State Sunday Closing Laws violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment have been considered and expressly rejected by this Court in *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 Sup.Ct. 1101 (1961); *Two Guys From Harrison-Allentown* v. *McGinley*, 366 U.S. 582, 6 L.Ed.2d 551, 81 Sup.Ct. 1135 (1961); *Gallagher* v. *Crown Kosher Supermarket of Massachusetts*, 366 U.S. 617, 6 L.Ed. 2d 536, 81 Sup.Ct. 1122 (1961).

III. THE JUDGMENT OF THE SUPREME COURT OF TEXAS RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

As stated previously, the Texas Legislature expressed the purpose of the Act "being to promote the health, recreation and welfare of the people" (Appendix B, Section 4). In *Hill* v. *Gibson Discount Center*, 437 S.W.2d 289 (Tex.Civ.App., Amarillo, 1968, writ ref'd n.r.e.), the Court stated:

> "We believe forbidding seven day work weeks promotes the health, recreation and welfare of the people of the State and comes within the police power of the State." (Page 293)

The Supreme Court of Texas reached a similar conclusion in *State of Texas* v. *Spartan Industries, Inc.*, 447 S.W.2d 407 (1969), whose appeal to this Court was dismissed for want of a substantial Federal question, *Spartan's Industries, Inc.* v. *Texas*, 397 U.S. 590, 25 L.Ed.2d 596, 90 Sup.Ct. 1359 (1970). At page 414 of the Supreme court of Texas' Opinion, they concluded:

> "Thus we are brought back to the question of the police power of the State, which turns upon the question of whether there is a reasonable relation between Article 286a (predecessor to Article 9001) and the health, recreation and welfare of the people of this State. It is not the function of the Courts to judge the wisdom of a legislative enactment. It is only when a Statute arbitrarily interferes with legitimate activities in such a manner as to have no reasonable relation to the general welfare, that this Court may rule the Statute to be unconstitutional on the grounds with which we are here concerned. With the long precedent for the constitutionality of the Sunday Clos-

ing Laws in this State, and with the view we take of this Statute as set forth above, we hold it to be validly related to the health, recreation and welfare of the people."

In *Gibson Products Co., Inc.* v. *State of Texas,* 545 S.W.2d 128 (1976), the Supreme Court of Texas once again found a reasonable relation between the Statute and its legislative purpose of promoting the health, recreation and welfare of the people of the State of Texas. On pages 129-130 of Justice Reevley's Opinion, he noted:

> "In State v. Spartan Industries, Inc., *supra,* we said that we understood the principal plan of the Statute to be the provision of effective sanctions to close most mercantile establishments on Sunday—Saturday being the better day for sales than Sunday. Allowing latitude for Sabbatarians and for some who prefer to tend only the Sunday trade, the Legislature thereby maintains the prevailing custom of people doing their serious shopping for clothing, furniture, automobiles, household and office appliances, and hardware on weekends. When the Legislature retained the Statute in 1973, it apparently decided to continue to serve that purpose. We regard the matter as a Legislative question and reaffirm the constitutionality of the present Statute."

In *Soon Hing* v. *Crowley,* 113 U.S. 703, 28 L.Ed. 1145 (1885), the Judges of the Circuit Court were divided on whether or not a California Statute regulating public laundries constituted a restraint of trade. On page 710 of the Court's Opinion, Mr. Justice Field answered the certified question in the negative and noted:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate

> for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

For the reasons set forth above, Appellee's Motion to Dismiss the appeal should be in all things sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 25th day of October, 1978, three copies of the Motion of Appellee to Dismiss Appeal were mailed, postage prepaid, to Royal Furgeson, P. O. Drawer 2800, El Paso, Texas 79999, Counsel for Appellant, and an additional three copies were mailed, postage prepaid, to David Kendal, First Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711. I further certify that all parties required to be served have been served.

FRANK FEUILLE, IV

APPENDIX

APPENDIX A

OPINION

GIBSON DISTRIBUTING COMPANY, INC., ET AL. v. DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.

No. B-7383

Direct Appeal from El Paso County.

Cause submitted May 10, 1978.

Judgment of the District Court is affirmed. (Opinion by Chief Justice Greenhill.)

For Appellants: Kemp, Smith, White, Duncan and Hammond, Royal Furgeson, El Paso, Texas.

For Appellees: Scott, Hulse, Marshall and Feuille, Frank Feuille, IV, El Paso, Texas.

This is another lawsuit attacking the constitutionality of the so-called Sunday Closing Law of Texas, Article 9001 of our civil statutes.[1] Two grounds for the attack are due process and equal protection. The third is a contention that the Texas statute is invalid because it deals with restraint of trade, a field which, it is argued, has been preempted by the Congress and its Sherman Antitrust Act.

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1. Unless otherwise indicated, statutory references are to Vernon's Texas Statutes Annotated. Article 9001 of the civil statutes was formerly Article 286a of the Penal Code. The statutory change was the subject of a major point in *Gibson Products Co., Inc. v. State*, 545 S. W. 2d 128 (Tex. 1976). The standing of Respondents to bring this suit is not a point of error in this court.

More specifically, the point is that "Article 9001 . . . was preempted by the Sherman Act. . . ."

The case reaches us as a direct appeal from a district court in El Paso. That court upheld the constitutionality of the statute. We affirm that judgment.

Due Process and Equal Protection

The constitutional assaults of lack of due process and equal protection were made in at least two of our previous decisions.

In *State v. Spartan's Industries, Inc.*, 447 S. W. 2d 407 (Tex. 1969), in the face of a strong dissenting opinion of three justices, this court held that the statute was a valid exercise of the police power by the Texas Legislature; that it was reasonably related to the public health and welfare; that it treated all merchants alike and was not discriminatory; and was constitutional. Due process and equal protection were written upon at length.

Some seven years later, similar assaults were made in *Gibson Products Company, Inc. v. State,* 545 S. W. 2d 128 (Tex. 1976). Again by a divided court, the decision was that the statute was constitutional. The statute has not been changed; and while there were differences of opinion among us, we now regard this matter as settled. We, therefore, follow the two cases set out above; and the points that the statute is unconstitutional as lacking in due process and equal protection are overruled.

Federal Preemption

The argument that the "Sunday Closing Statute" was intended to benefit certain merchants over other merchants and to restrain trade is not new either. The substance of these arguments was made in the above cases and in

support of Gibson's equal protection and due process attacks on Article 9001. But the particular argument that the State's right to regulate the Saturday and Sunday sales of merchants has been preempted by the federal antitrust Sherman Act is new in this Court.

Article VI, section 2, of the Constitution of the United States (the Supremacy Clause) provides that the constitution and laws of the United States made in pursuance thereof "shall be the supreme Law of the Land." We recognize, as we must, the force of that provision. It is our view, however, that the Congress, by enacting the Sherman Act, did not intend to prohibit a valid exercise of the police power of the States,—as this Court has held the statue in question to be.

As we read *Parker v. Brown,* 317 U.S. 341 (1943), and other opinions of the Supreme Court, state action affecting commerce is generally considered to be "exempted" from the Sherman Act. Perhaps it is more accurate to say that the rule of preemption is simply not applicable to such state action. The Supreme Court, in *Parker v. Brown,* stated that,

> ". . . nothing in the language of the Sherman Act or in its history [suggests] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

Not every act of a state or local subdivision necessarily comes within the exception to the Sherman Act. Thus, where a city engages in the business of selling electricity, gas, and water, its alleged acts to restrain trade from a competing privately owned utility are not automatically exempt. *City of Lafayette, Louisiana v. Louisiana Power & Light Co.,* ..... U.S. ....., 46 U.S. Law Week 4265 (March 29, 1978). The lines of demarcation

under *Parker v. Brown* are discussed in that Louisiana case and in the recent lawyer-advertising case of *Bates and O'Steen v. State Bar of Arizona,* ..... U.S. ....., 53 L.Ed.2d 810 (1977). In *Bates and O'Steen,* it was decided that the regulation and restriction of lawyers' advertising by the Supreme Court of Arizona was not preempted by the Sherman Act. Rather, the court held, such state action fell within the exemption announced in *Parker v. Brown.*[2] *See also, Taylor Drug Stores, Inc. v. Associated Dry Goods Corporation,* 560 F. 2d 211 (6th Cir. 1977). In the light of these opinions, it is our conclusion that Article 9001 is not preempted by the Sherman Act.

The judgment of the district court, which upheld Article 9001 against these attacks, is affirmed.

Joe R. Greenhill
Chief Justice

Opinion delivered July 12, 1978.

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2. The *Bates and O'Steen* case held, however, that the blanket suppression of legal advertising violated the free speech clause of the First Amendment.

APPENDIX B

TEXAS REVISED CIVIL STATUTES

Art. 9001. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear, home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys; excluding items customarily sold as novelities and souvenirs; mattresses; bed coverings, household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalities

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed by Acts 1967, 60th Leg., p. 79, ch. 39, § 1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas[1] are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act. Acts 1961, 57th Leg., 1st C.S., p. 38, ch. 15, eff. Nov. 7, 1961.

This article was transferred from Vernon's Ann.P.C. art. 286a by authority of § 5 of Acts 1973, 63rd Leg., p. 995, ch. 399 enacting the new Texas Penal Code.

Section 4a, repealed by Acts 1967, 60th Leg., p. 79, ch. 39, § 1, required certification for emergency purchases.